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86-395

No. _____

In the Supreme Court of the United States

October Term, 1986

KOSTANENOS NICK HRONOPOULOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1. Whether a special attorney's commission can be authorized by anyone other than the Attorney General pursuant to 28 U.S.C. §543.

Question 2. Whether the client is the holder of the attorney-client privilege so that only the client has the capacity to waive the privilege.

Question 3. What factors establish a *prima facie* case in determining whether the crime-fraud exception applies to the attorney-client privilege?

PARTIES TO THE PROCEEDINGS

The United States of America and several individuals were parties to the proceedings below. The individuals were Kostanenos Nick Hronopoulos, Paul F. Scheibe, George Hronopoulos, Richard A. Parker, III, and Howard Blumenthal. Petitioner, Kostanenos Nick Hronopoulos, and respondent, the United States of America, are the only parties to this appeal.

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KOSTANENOS NICK HRONOPOULOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner KOSTANENOS NICK HRONOPOULOS petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit rendered in this action.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is unreported and is attached as Appendix A. The *per curiam* opinion of that appellate court denying the petition for a rehearing and suggestion for a rehearing *en banc* is also unreported and is attached as Appendix B.

JURISDICTION

The opinion of the appellate court was entered on April 22, 1986. The opinion affirmed the district court's entry of judgment, attached as Appendix C, which followed a conditional guilty plea pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by petitioner and denied in a *per curiam* opinion of the reviewing court on July 10, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

EXISTENCE OF JURISDICTION BELOW

The District Court for the Southern District of California had federal subject-matter jurisdiction over this matter because petitioner was charged under 18 U.S.C. §§1341 and 2314, 15 U.S.C. §§77Q(a) and 77x, and 26 U.S.C. §7201.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §515

> "(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought."

28 U.S.C. §543

> "(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires."

STATEMENT OF THE CASE

In early 1977, Drywood Corporation ("Drywood") became the subject of a joint Securities Exchange Commission and California Department of Corporations investigation. Drywood retained the law firm of Arthur J. Crowley ("Crowley")[1] for representation in that investigation. Investigators from the SEC and California Department of Corporations met with Crowley regarding an audit of Drywood's financial affairs in order to determine whether Drywood would provide its limited partners with the necessary financial information for a rescission offer. (RT 55, 11/29/82.)[2]

The SEC then served an investigative subpoena upon Blumenthal in November 1978, which commanded that he produce "copies of all documents (except privileged communications or work product) pertaining to litigation in which Drywood . . . [or] K. N. Hronopoulos is or was a party." (ER 349-50.) In producing Drywood documents at his office on January 10, 1979, Blumenthal made an effort "to put aside all matters covered by the attorney-client privilege but the file 'Building K Attorney Notes' was placed on the table inadvertently and by mistake since [Blumenthal] never intended to waive the attorney-client or work product privileges."[3] (ER 338.)

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[1]During this time, Howard Blumenthal ("Blumenthal") was an attorney in the Crowley law office.

[2]"RT [date]" shall refer to Reporter's Transcript of the date specified. "ER" shall refer to Excerpt of Record.

[3]Not only was the "Building K Attorney Notes" the only pink-labelled file on the table—the other files being labelled with white—

The "Building K Attorney Notes" file contained Blumenthal's handwritten notes of his impressions, thoughts and possible strategies regarding the representation of petitioner, personally, and Drywood. (RT 25-6, 8/20/84; RT 45, 1/14/83.)

Two of the government agents who inspected Drywood's document production on January 10, 1979, testified relative to their seizure of Blumenthal's attorney-client file. One was Gerald Cunningham ("Cunningham"), a regional SEC trial counsel who had been investigating Drywood's financial affairs in the Fall of 1977. (ER 149; 479.) Along with David Mott and John Booker ("Booker") of the California Department of Corporations (RT 22, 1/14/83), Cunningham inspected Drywood's subpoenaed documents that day at Crowley's office. (RT 57-9; 85-6, 11/29/82.) During the document examination, one of the inspectors happened upon the "Building K Attorney Notes" file (RT 45; 53-4, 1/14/83), which contained a series of Blumenthal's handwritten notes. (RT 60, 11/29/82.) Reading through the notes, "it became clear to [the inspectors] that attorney-client privilege questions might be presented by these notes"[4] (RT 60-1, 11/29/82), and that "[i]t certainly was obvious to [them] that Mr. Blumenthal may not have intended to produce these notes . . ." (RT 61; 87, 11/29/82; RT 68-9 and 73, 1/14/83.)

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but that file was the only one on the table containing attorney notes. (ER 338.)

[4]According to Cunningham, the inspectors were not focusing upon the work product privilege; they were solely concerned with the attorney-client privilege. (RT 62, 11/29/82; RT 54-5, 1/14/83.) It seemed to the inspectors, however, that they did not have "enough information to know whether the privilege would apply in any event because [they] couldn't tell for certain whether all the necessary conditions to establish the privilege had been met." *Id.*

Booker also testified about the events at the Drywood document production. Upon discovery of the Blumenthal file, the investigators asked Blumenthal repeatedly whether any of the documents were encompassed by the attorney-client privilege and whether Blumenthal would disclose them. In response, Blumenthal answered repeatedly that, to his knowledge, none of the documents being produced were privileged; if any documents happened to be privileged, Blumenthal told the investigators, he would not intentionally disclose them. After the final exchange between Blumenthal and the inspectors, the inspectors decided that it was proper for them to copy the notes even though they suspected that they may have been privileged. (RT 87, 11/29/82.)

Accordingly, Booker took verbatim handwritten notes of the contents of the Blumenthal file (*id.*), and he later dictated notes of that file,[5] which were placed in a government file used as part of the Drywood investigation[6] (RT 85, 11/29/82; RT 58-9, 1/14/83), even before it was determined by a court as to whether the notes were privileged (RT 88-9, 11/29/82; RT 58-9, 1/14/83).[7]

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[5]Booker's verbatim notes and the "Building K Attorney Notes" file were admitted into evidence later at a hearing on one of several pretrial motions as Exhibits 2B and 2A, respectively. (RT 68-9, 2/25/83.)

[6]Referral of that SEC investigation file to the United States Attorney's Office included those notes. (RT 90, 11/29/82.)

[7]Booker "copied the notes so that [the inspectors] could show a court what the documents would show if [the inspectors] needed to seek [a motion] to compel production." (RT 47, 1/14/83.) It never occurred to Booker to forego placing his verbatim notes in the SEC investigation file until a court ruling could be obtained as to their status (RT 69, 1/14/83), despite the fact that Booker regards his own notes of conversations with potential witnesses to be work product (RT 56, 1/14/83).

After copying the "Building K Attorney Notes" file, the inspectors placed it among other files that required duplication; it was not segregated or shown to Blumenthal. (RT 47, 1/14/83; RT 93-4, 11/29/82.) Upon discovery by Blumenthal that the file inadvertently had been produced to the investigators, he refused to duplicate or turn the file over to the investigators because he asserted it was privileged. (RT 94, 11/29/82.)

Thereafter, SEC staff attorney Lawrence L. Kiser ("Kiser") received a special appointment in April 1980, which permitted him to assist the United States Attorney in a criminal prosecution of petitioner, Drywood and others. His initial appointment expressly precluded Kiser from appearing at or presenting matters before a Grand Jury. Although that initial appointment was extended three times, none of his special appointment letters expressly changed the original appointment's restrictions upon Kiser. (ER 363-64.)

Kiser received a June 7, 1981 letter extending his commission as a special attorney. After receiving this letter, which did not authorize Kiser to appear before a Grand Jury, Kiser asked the Administrative Office of the United States Attorney to check with Glen Stafford, Office of the Executive Director of the Department of Justice, to determine whether or not the July 7, 1981 letter authorized any Grand Jury appearances. On behalf of the Executive Director of the Department of Justice, and on July 16, 1981, Mr. Stafford telephonically advised that Kiser was permitted to make Grand Jury appearances. (ER 408.) At no time, however, did the *Attorney General* authorize Kiser to make any Grand Jury appearances.

On February 16, 1982 and March 1, 1982, the Grand Jury for the United States District Court for the

Southern District of California returned two separate indictments against petitioner, Drywood and others for violations of 18 U.S.C. §§1341 and 2314, 15 U.S.C. §§77Q(a) and 77x, and 26 U.S.C. §7201.[8] (ER 1-36.) Petitioner entered pleas of not guilty to all charges on March 2 and 16, 1982, and a jury trial was set.[9] (ER 503.)

Several pretrial motions pertinent to this petition were filed. Petitioner filed a motion to suppress evidence seized in violation of the attorney-client and work product privileges. (ER 37.) After government opposition and a hearing, the motion was denied. (ER 221, 260, 272, 283, 291, 496 and 499-501; RT 11/29/82, 1/14/83, 2/25/83, 8/22/83 and 8/20/84.) Petitioner next moved to disqualify Kiser from trial preparation[10] (ER 418) and to dismiss the indictments because Kiser was not authorized to appear before a grand jury. (ER 353.) The district court again denied both motions after government oppositon and a hearing. (ER 496-511.)

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[8]Securities fraud, conspiracy, mail fraud, interstate transportation of securities, and income tax evasion.

[9]Both indictments were joined for trial. (RT 1-2, 12/13/83.)

[10]The curious history of the SEC's involvement with Drywood formed the basis of the motion to disqualify Kiser from trial prosecution. Prior to joining the SEC in 1974 as a staff attorney, James Mercer, Jr. ("Mercer") had been an associate at Nelson, Liker & Merrifield. While at that firm, Mercer had represented Drywood and petitioner, attended a meeting to discuss potential federal and California securities laws violations relative to Drywood, and prepared a sensitive memorandum regarding those discussions. After Mercer joined the SEC, it nevertheless aggressively sought information from him as to his knowledge about Drywood. Not only did Kiser seek to depose Mercer, but Mercer testified in an affidavit that he had resisted attempts by the SEC to obtain confidential information about Drywood from him. (ER 434-37.)

Pursuant to a written plea agreement (ER 488), petitioner withdrew his previously entered plea of not guilty to Counts 1 and 25, and he entered a conditional plea of guilty[11] to conspiracy to commit securities fraud and to income tax evasion on December 14, 1983 pursuant to Rule 11 of the Federal Rules of Criminal Procedure. (ER 514; RT 6, 26-7 and 30, 12/14/83.) On August 20, 1984, after additional witness testimony and a hearing, the district court again denied petitioner's renewed motions to suppress Blumenthal's attorney notes and the MJL-produced documents. (ER 516; RT 41-2.)

On October 26, 1984, petitioner was sentenced to the custody of the United States Attorney General on Count 25 for two years pursuant to 18 U.S.C. §4205(b)(2) and appellant was sentenced to five years probation supervision on Count 1. (ER 516.) A notice of appeal was timely filed by petitioner on October 29, 1984 (ER 493 and 516), and petitioner remains free from custody on his own recognizance. (ER 492.)

On April 22, 1986, petitioner's appeal was decided, and the reviewing court affirmed petitioner's conviction. A petition for a rehearing *en banc* was denied by the appellate court on July 10, 1986.

REASONS WHY THE WRIT SHOULD BE GRANTED

The writ should be granted pursuant to Rules 17.1(a) and (c) of the Supreme Court Rules. Whether special attorneys who are not "specifically directed" by the Attorney General, pursuant to 28 U.S.C. §515(a), to appear before federal grand juries may do so is an

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[11]Through his conditional plea pursuant to Rule 11(a)(2), petitioner reserved for appellate review the district court's adverse rulings on the specified pretrial motions.

important question. The Ninth Circuit's affirmative response conflicts with this Court's case precedents and with Congress' clear intent.

A further basis for granting this petition is the need for this Court to reaffirm that the client, and not his attorney, is the holder of the attorney-client privilege. The federal circuits are adopting conflicting positions as to the holder of the privilege, and this Court's resolution is required to resolve this conflict in order to preserve the fundamental concept of the attorney-client privilege.

Finally, this Court should exercise its supervisory powers over the lower federal courts by defining the *prima facie* showing necessary to establish the crime-fraud exception to the attorney-client privilege. Unless a clear standard is established, the discourse among the courts will seriously obstruct the attorney-client privilege.

I.

THE NINTH CIRCUIT MISAPPLIED FEDERAL PROCEDURE FOR EMPOWERING SPECIAL ATTORNEYS TO APPEAR BEFORE GRAND JURIES

A. A Special Attorney's Commission Cannot Be Authorized By Anyone Other Than The Attorney General

This appeal raises serious questions about the administration of our federal, criminal justice system. Enshrined in our Constitution is the concept that grand jury proceedings must be kept secret and insulated. Breaches of that secrecy must be analyzed critically because both Congress and this Court stand ready to defend the Grand Jury against unwarranted intrusions.

United States v. Sells Engineering, Inc., 463 U.S. 418, 424-425 (1983). If the Ninth Circuit's decision in this case is correct, the result will be unauthorized attorneys appearing before secret, grand juries pursuant to 28 U.S.C. §543 even though the Attorney General has expressly prohibited that appearance. If left unchecked, the Ninth Circuit's holding would malign the sanctity of the Grand Jury because it contradicts a literal reading of Rule 6(d) of the Federal Rules of Criminal Procedure.

To rule, as the Ninth Circuit has here, that *any* federal officer (other than the Attorney General or his delegates as specified by statute) may appoint special attorneys to participate before grand juries misconstrues Congress' intent. Only the Attorney General is empowered to authorize special attorneys to act before grand jury proceedings pursuant to the "specifically directed" requirement of 28 U.S.C. §515(a). Without being "specifically directed" by the Attorney General, a special attorney who participates before the Grand Jury violates Rule 6(d). Undoubtedly, Congress conferred upon the Attorney General the power to appoint special attorneys to participate in criminal proceedings, including grand jury proceedings. Regulations also permit the Attorney General to delegate this power to the Assistant Attorney General in charge of the Criminal Division. 28 C.F.R. §§0.55 and 0.60. But the Executive Office of the United States Attorney, contrary to the Ninth Circuit's opinion, has *never* been empowered to appoint special attorneys. *See, United States v. Giordano*, 416 U.S. 505, 523 (1974).

Additionally, the appellate court decision deserves review because it conflicts with this Court's prior rulings. In *United States v. Giordano*, 416 U.S. 505, 523 (1974), this Court held that, where Congress vests the Attorney General with the power to authorize a specific administrative action, the Executive Assistant to the

Attorney General *cannot* exercise that authority. Moreover, in *United States v. Nixon,* 418 U.S. 683, 694 (1974), this Court recognized that the Attorney General alone had the power to appoint special prosecutors. *See also United States v. Sells Engineering, Inc.,* 463 U.S. 418, 429-430 n.12 (1983).

This Court's precedent is based upon the rationale that the federal justice system is fraught with complexity and overlap. Effective prosecution necessarily requires established lines of delegation and accountability. Indeed, by allowing the Executive Office of the United States Attorney to act *ultra vires,* the Ninth Circuit frustrates the congressional design behind Section 515(a). In its decision, the Ninth Circuit blurrs already complex lines of authority while simultaneously subverting the Attorney General's supervision and accountability. By exercising its supervisory power over the lower federal courts, this Court may deter the various Circuits, like the Ninth Circuit here, from clashing with clear, congressional guidelines and case precedent. *Marshall v. United States,* 360 U.S. 310, 310-311 (1959).

B. A Special Attorney Cannot Participate Before The Grand Jury Unless He Is "Specifically Directed" To Do So

Whether a special attorney may appear before the Grand Jury upon an oral authorization not stated in his commission is an important federal question, which has not been resolved by this Court. The Ninth Circuit's opinion affirmed the propriety of an unverified oral authorization, thereby abrogating the "specifically directed" requirement of 28 U.S.C. §515(a). Congressional hearings prior to the enactment of Section 515(a), however, indicate a definite, pragmatic intent to maintain the "specifically directed" language. In accord with

Congress' clear intent, and strictly construing Section 515(a), is the district court's opinion in *United States v. Crispino,* 392 F. Supp. 764, 781 (S.D.N.Y. 1975), *rev'd in an unpublished opinion* 517 F.2d 1395 (2d Cir. 1975), which required the special attorneys' commission to *specifically* authorize Grand Jury appearances.[12]

Matched against Congress' clear mandate is a long line of divergent lower court opinions liberalizing the "specifically directed" mandate beyond its practical bounds. A prime example is *In re Grand Jury Subpoena of Persico,* 522 F.2d 41, 66 (2d Cir. 1975), where the Second Circuit held (with absolutely no supporting authority) as follows:

> . . . an officer or other full-time employee of the Department of Justice must be "specifically directed" to conduct grand jury proceedings if he is not a United States Attorney or an Assistant United States Attorney. We hold that such a specific direction . . . need not be embodied in a single written authorization, *but may be implied from other writings, guidelines, practices and oral directions transmitted through a chain of command within the Department.*

(Emphasis added.) Hence, the disparity among the lower courts on this point signifies a clear need for statutory interpretation resolving this issue.[13] This Court should

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[12]*Accord United States v. Goldman,* 28 F.2d 424, 430 (D. Conn. 1928); *United States v. Huston,* 28 F.2d 451, 454 (N. D. Ohio 1928); *United States v. Morse,* 292 F. 273, 276 (S.D.N.Y. 1922); *United States v. Cohen,* 273 F. 620, 621 (D. Mass. 1921).

[13]Other cases liberalizing the "specifically directed" requirement include *Shushan v. United States,* 117 F.2d 110 (5th Cir. 1941), *cert. denied,* 313 U.S. 574 (1941); *United States v. Hall,* 145 F.2d 781, 785 (9th Cir. 1944), *cert. denied,* 324 U.S. 871 (1945); *United*

grant a writ of certiorari to resolve this conflict among the federal circuits. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 (1980).

II.

THIS COURT SHOULD ESTABLISH THAT ONLY THE CLIENT POSSESSES AND MAY WAIVE THE ATTORNEY-CLIENT PRIVILEGE

This Court must reaffirm the traditional rule that the client and not the attorney holds the attorney-client privilege and, therefore, only the client may waive it. Although this Court articulated that rule 160 years ago in *Chirac v. Reinicker,* 24 U.S. 280, 294 (1826), the federal circuits are presently divided over this hallmark of Anglo-American jurisprudence.[14] Even at the district court level, there is serious debate as to whether an attorney may inadvertently waive his client's attorney-client privilege. *Compare Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982) *with Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 257-60 (N.D. Ill. 1981).

The majority of the federal circuits maintain the traditional rule that only the client may possess and, thus, waive the attorney-client privilege. *See Kevlick v. Goldstein,* 724 F.2d 844, 850 (1st Cir. 1984); *United States v. Bump,* 605 F.2d 549, 550-51 (10th Cir. 1979); *United States v. Cole,* 456 F.2d 142, 144 (8th Cir. 1972);

States v. Powell, 81 F. Supp. 288, 291 (E.D. Mo. 1948); *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 256-57 (D. Md. 1931); *United States v. Martins,* 288 F. 991, 992 (D. Mass. 1923).

[14]The attorney-client privilege is the oldest of the privileges for confidential communications, dating back to the reign of Elizabeth I. 8 J. WIGMORE , EVIDENCE §2290 (McNaughten Rev. 1961).

Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967); *Republic Gear Co. v. Borg-Warner Corp.,* 381 F.2d 551, 556 (2d Cir. 1967); *Tillotson v. Boughner,* 350 F.2d 663, 665 (7th Cir. 1965). In the instant case, however, the Ninth Circuit held that an attorney may, even inadvertently, waive his client's privilege, and that this waiver is imputed to the client without his knowledge or consent. This holding reconfirms the Ninth Circuit's opinion in *Weil v. Investment/Indicators, Research and Management, Inc.,* 647 F.2d 18 (9th Cir. 1981)[15] which is a view shared only with the District of Columbia Circuit. *See In re Grand Jury Investigation of Ocean Transportation,* 604 F.2d 672 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 915 (1979).[16]

Furthermore, even if *Weil* could stand as an exception, the Ninth Circuit opinion in this case should not extend *Weil* beyond the parameters imposed by the Ninth Circuit in *Weil.* The instant case fits neatly into the Ninth Circuit's self-imposed exception to this "new" rule of inadvertent disclosure:

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[15]Adopting the rationale of *Underwater Storage, Inc. v. United States Rubber Co.,* 314 F. Supp. 546, 549 (D.D.C. 1970), *Weil* held that an attorney's inadvertent waiver of the attorney-client privilege is a waiver imputed to the client. *Weil,* 647 F.2d at 25. In *Weil,* the Ninth Circuit reversed itself from its previous position in *Transamerica Computer Co, Inc. v. IBM, Inc.,* 573 F.2d 646, 650-51 (9th Cir. 1978), where the court found that the attorneys' disclosure of documents was *not* a waiver of the client's privilege. Shortly before *Weil,* at least one district court in the Ninth Circuit enunciated the traditional rule that only a client may waive the attorney-client privilege. *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455, 459-460 (N.D. Cal. 1978).

[16]In the District of Columbia, *Ocean Transportation* seems to reaffirm *Underwater Storage, Inc. v. United States Rubber Co.,* 314 F. Supp. 546, 549 (D.D.C. 1970).

> Indeed, when as here, the privileged communication is *voluntarily disclosed without objection by the asserting party's counsel and in the absence of surprise or deception by opposing counsel,* it may be unnecessary to look beyond the objective fact of disclosure in ruling on the question of waiver.

(Emphasis added; citation omitted.) *Weil*, 647 F.2d at 25 n. 13.

The federal investigators' surreptitious "discovery", seizure and copying of Blumenthal's attorney notes, which were fully contained in an odd-colored and well-marked cover, is just the type of surprise and deception alluded to in *Weil*, 647 F.2d at 25 n.13. Hence, the Ninth Circuit erroneously extended *Weil* beyond its self-imposed bounds. Therefore, to preserve the very essence of the attorney-client privilege, this Court should resolve the dichotomy posed and perpetuated by the Ninth Circuit.

Jeremy Bentham has already explained the consequences should this Court not consider this issue. In essence, he maintains, if the attorney-client privilege is obstructed so as to disclose confidential information without the client's knowing and voluntary consent, a client may not disclose material facts to his attorney.[17] The

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[17]As envisioned by Mr. Bentham ". . . the first thing the . . . attorney will say to his client, will be—Remember that, whatever you say to me, I shall be obliged to tell, if asked about". 8 J. WIGMORE , EVIDENCE §2291 at 549 (McNaughten Rev. 1961). The rationale of Jeremy Bentham's foresight is magnified in the context behind "criminal" prosecutions, the consequences of which are far more serious than in civil litigation. Whereas the unauthorized disclosure of a confidential communication could cost a civil litigant money, the cost of liberty to a criminal defendant (such as petitioner) has no price.

"chilling" effect is evident. Clients will not seek legal counsel in fear of disclosure, and prospective clients may simply cease seeking attorneys to vindicate their rights. As a result, the public policies advanced by the privilege—(1) to secure the client's confidence in the secrecy of his communications, (2) to encourage clients to fully disclose material facts to thier attorneys, and (3) to promote broader interest in the observance of the law and the administration of justice—will be thwarted.[18] *See Upjohn Co. v. United States,* 449 U.S. 383, 392-393 (1981); *Fisher v. United States,* 425 U.S. 391, 403 (1976). If an attorney's carelessness is imputed to a criminal defendant, then the entire attorney-client privilege will be abrogated. Indeed, this Court recently reaffirmed its support for the traditional attorney-client privilege in *Commodity Futures Trading Comm'n. v. Weintraub,* __ U.S. __, 105 S.Ct. 1986, 1991 (1985), by stating that *the client,* in that case a corporation, is the holder of the attorney-client privilege.

Finally, the Ninth Circuit opinion treads upon the professional standards of the American Bar Association, a self-policing organization that attempts to maintain high professional standards. DR 4-101(B)(1) and (2) of the American Bar Association Model Rules of Professional Responsibility expressly forbid attorney disclosures of the client's confidences. The Ninth Circuit, however, implicitly condones violations of DR 4-

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[18]Moreover, in Rule 503(c) of the Proposed Federal Rules of Evidence, this Court approved the principle that the client is the holder of the attorney-client privilege. Although not adopted by Congress, the Proposed Federal Rules of Evidence are guideposts whose import should not be ignored by the federal courts. *In re Grand Jury Proceedings, Vargas,* 723 F.2d 1461, 1466 n.4 (10th Cir. 1983). Likewise, in addressing one's ability to waive privileges, Rule 511 of the Proposed Federal Rules of Evidence unquestionably bestows the right of waiver upon the client.

101(B)(1) and (2) inasmuch as the attorney is deemed a co-holder of the privilege, and the attorney's disclosure is imputed to a criminal defendant. Even though the public desires higher professional standards, the Ninth Circuit condones lower standards by approving breaches of the client's confidences. This Court should grant a writ of certiorari to resolve this conflict among the federal circuits. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 (1980).

III.

THIS COURT SHOULD DEFINE WHAT FACTORS CONSTITUTE A *PRIMA FACIE* CASE FOR APPLYING THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

The Ninth Circuit applies the crime-fraud *exception* in such a fashion that it effectively swallows the attorney-client privilege. Indeed, Wigmore implored the legal community against over-extending the crime-fraud exception by recognizing the difficulty in containing the exception within the rule:

> It is possible, of course, to take merely the practical point of view and to declare that the privilege must at least cease to be a cloak for criminal conspiracy, regardless of its logic, and to contrive an arbitrary limit for this exception. But it seems hardly necessary to do violence to the theory of the privilege.

8 J. WIGMORE , EVIDENCE §2290 (McNaughten Rev. 1961). Certainly, a balance must be struck between the need to preserve the attorney-client privilege and the policy forbidding clients from conspiring with or without

their attorneys to commit crimes or frauds under the veil of the attorney-client privilege. To strike this balance, this Court should exercise its supervisory powers over the federal courts (*see Marshall v. United States,* 360 U.S. 310, 310-11 (1959)) and promulgate the objective factors to be used by the lower courts when determining whether the government has satisfied its burden of establishing the crime-fraud exception.

In the seminal case introducing the *prima facie* standard, *Clark v. United States,* 289 U.S. 1, 15 (1933), this Court analogized the attorney-client privilege to the privilege against self-incrimination where "[t]he privilege takes flight if the relation is abused." *Id.* at 15. This Court also expressed its continued allegiance to the attorney-client privilege when it observed that:

> [t]here are early cases apparently to the effect that a mere charge of illegality, not supported by evidence, will set the confidences free. [Citations omitted.] But this conception of the privilege is without support in later rulings. 'It is obvious that it would be absurd to say that the privilege would be got rid of merely by making a charge of fraud.' [Citation omitted.] To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie* evidence that it has some foundation in fact." [Citation omitted.] When the evidence is supplied, the seal of secrecy is broken. *Id.* at 15.

Through *Clark,* this Court labelled the burden necessary to establish the crime-fraud exception as *"prima facie,"* but it neither defined its scope nor indicated what factors should be met to satisfy the burden. Since *Clark,* the federal courts have produced

myriad approaches and definitions to give meaning to *"prima facie,"* and they are likely to continue until this Court acts. *See, e.g., In re Grand Jury Proceedings In The Matter of Fine,* 641 F.2d 199, 203 (5th Cir. 1981) (appellate court applying a vague dictionary definition of *prima facie* to evaluate district court ruling).

For example, the Fifth Circuit considers whether there is a *prima facie* showing that the attorney-client *relationship* was intended to further a criminal enterprise. *United States v. Dyer,* 722 F.2d 174, 177 (5th Cir. 1983); *In re Grand Jury Proceedings In The Matter of Fine,* 641 F.2d at 203. The Eighth Circuit also considers the relationship, but adds a factor; it is the client's *purpose* in obtaining the aid that is controlling. *U.S. v. Calvert,* 523 F.2d 895, 909 (8th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976). The Third Circuit emphasizes the client's *intent* regarding the attorney-client relationship. *In re Grand Jury Proceedings,* 604 F.2d 798, 802-803 (3d Cir. 1979).

The Ninth Circuit, in the instant case, discussed the *"prima facie"* burden in terms of whether the contents of the documents indicated that someone[19] was furthering a crime or fraud. Furthering a crime or fraud is one of the guideposts in Rule 503(d)(1) of the Proposed Federal Rules of Evidence approved by this Court. *See also United States v. Hodge and Zweig,* 548 F.2d 1347, 1354-55 (9th Cir. 1977); *United States v. Mardian,* 546 F.2d 973, 982 (D.C. Cir. 1976). Yet, in the instant case, the Ninth Circuit and the district court failed to consider the "nexus" between the crime for which petitioner was indicted and the communication in question.

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[19]The Ninth Circuit was less than lucid as to whether petitioner's actions or the actions of Blumenthal, his attorney, were at issue.

Not only do the federal courts emphasize different factors, but they also expand and contract the scope of the crime-fraud exception depending upon the factors utilized. A prime illustration setting forth an expansive view of the crime-fraud exception is *Matter of Doe,* 551 F.2d 889, 900-901 (2d Cir. 1977), where the Second Circuit ruled that it was enough to defeat the claim of privilege to show that the contemplated crime would inure to the client's benefit and that he *might* participate. Another expansive approach was taken in *United States v. Friedman,* 445 F.2d 1076, 1085 (9th Cir. 1971), *cert. denied sub nom. Jacobs v. United States,* 404 U.S. 958 (1971), where the standard was couched in terms of losing the privilege when the communications concern *contemplated* unlawful acts by the client. Curiously, that same case adds a restrictive factor, namely, the communication is not privileged when the purpose is to further the crime charged in the indictment or future intended illegality. *Friedman,* 445 F.2d at 1086.

Perhaps the most restrictive approach has been followed in *United States v. Shewfelt,* 455 F.2d 836, 840 (9th Cir. 1972), *cert. denied,* 406 U.S. 944 (1972), where the Government's *prima facie* case required proof of a crime or fraud independent of the communication. This requirement makes practical sense because it requires the party asserting the exception to point to facts other than those contained within the communication itself to authenticate the crime-fraud alleged. As the Ninth Circuit itself stated years later, "[p]olice and prosecutors must at times act upon bare suspicion; judges must not so act." *In re Grand Jury Proceedings: United States v. Lawson,* 600 F.2d 215, 219 (9th Cir. 1979).

Notwithstanding the fact that an objective test from this Court would assist the Circuits in a uniform application of the crime-fraud exception, further reason

exists for establishing specific factors for judicial consideration. That is, because the crime-fraud exception requires an allegation of criminal conduct, a mere charge of illegality should be deemed inadequate to establish the exception. *Clark v. United States,* 289 U.S. 1, 15 (1933).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted so this Court may vacate the indictment due to the unauthorized Grand Jury appearance of a special attorney ordered by someone other than the Attorney General in violation of 28 U.S.C. §515(a). Alternatively, it is respectfully submitted that the writ should issue so this Court may reaffirm the principle that the client is the holder of the attorney-client privilege and reverse and remand this case to the district court so this principle may be applied. Finally, it is respectfully submitted that the writ should issue so this Court may propound objective factors for applying the crime-fraud exception and reverse and remand this case so that the factors may be applied.

Respectfully submitted,

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(213) 475-9232
By T. J. Pantaleo

Attorney for Petitioner
KOSTANENOS NICK HRONOPOULOS

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KOSTANENOS NICK HRONOPOULOS, Defendant-Appellant.	FILED April 22, 1986 No. 84-5310 D.C. #82-0159-EBG **MEMORANDUM***

Appeal from the United States District Court for the Southern District of California
Hon. Earl B. Gilliam, District Judge Presiding

Argued and Submitted January 10, 1986
Pasadena, California

BEFORE: WALLACE, FARRIS, and NORRIS, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 21.

APPENDIX A

This appeal stems from appellant Hronopoulos' conviction, following a conditional guilty plea, for conspiracy, in violation of 18 U.S.C. §371, and income tax evasion, in violation of 26 U.S.C. §7201. Hronopoulos asserts four claims on appeal: (1) The district court erred in denying his motion to suppress accountant's work papers and supporting documents, (2) the district court erred in denying his motion to suppress evidence concerning the contents of the attorney notes file, (3) the district court erred in finding the SEC attorney was authorized to appear before the indicting grand jury, and (4) the district court erred in refusing to disqualify the SEC attorney based on a conflict of interest or the appearance of impropriety.

Appellant's first contention, that the district court erred in failing to suppress the accountant's workpapers, fails primarily because the appellant lacks standing to bring the motion. Appellant has no standing to raise the attorney-client privilege simply because he has never established that he had an attorney-client relationship with respect to the papers turned over by the accountant. Appellant's only connection to the documents in question is that the documents related to a corporation of which appellant was an officer. The fact that appellant was an officer or director of the client corporation (Drywood) does not give him standing to assert the privilege. The privileges involved can be only asserted on behalf of the entity and not for the personal benefit of a representative. *See CFTC v. Weintraud,* 105 S.Ct. 1986, 1991 (1985).

Further, Drywood, by releasing the documents to the accountant (MJL), waived the privilege with respect to these documents. Drywood's attorneys turned over the documents in question to MJL. Drywood placed no restrictions on MJL's use of the documents and the

information contained within. Since these documents were disclosed to MJL for the purposes of an independent public audit, it was plainly within the contemplation of Drywood and its counsel that any privilege with respect to these documents was being waived. *See, United States v. Arthur Young & Co.*, 104 S.Ct. 1495, 1502-04 (1984).

Appellant attempted to surmount the standing barriers by arguing that he was not vicariously asserting Drywood's privilege but was asserting the privileges on behalf of Drywood as president, chairman of the board and majority stockholder of Drywood. The problems with this theory are manifest. Not only was Drywood Corporation not a party to this action but Drywood had itself litigated these issues and a final judgment had been entered holding that Drywood had waived any attorney-client or work product privilege by releasing the documents to MJL.

On the standing issue, the appellant finally contends that he has established standing by asserting that the attorneys in question also represented him individually. This argument, however, misses the mark. Any attorney-cleint privilege created by the personal representation of appellant by the attorneys in question would apply solely to those communications to the attorney that dealt with this personal representation. *See, CFTC v. Weintraud*, 105 S.Ct. 1986, 1991 (1985). Appellant has provided no basis for determination that a certified public audit of Drywood could in any way have implicated the personal communications of appellant to the attorneys in question for the purposes of rendering legal advice to appellant on personal matters.

Appellant's attempt to resurrect the privilege by asserting that MJL's audit was also to be used for

litigation purposes must also fail. In order for the privilege to apply to communications made to accountants, the communications must be made to the accountants solely for the purposes of obtaining legal advice from the attorneys. *See, Arthur Young & Co.,* 105 S.Ct. 1502-04; *Couch v. United States,* 409 U.S. 322, 335 (1973). Thus, even if the asserted ancillary purpose for the audit is accepted, the disclosure to the accountants was not made *solely* to obtain legal advice.

II

Appellant's second contention is that the district court erred in denying appellant's motion to suppress evidence concerning the contents of the attorney notes files. Appellant moved in the district court to dismiss the indictment or in the alternative to suppress evidence concerning the contents of a file identified as "D/A: Building K, Attorney Notes," arguing that the evidence had been obtained in violation of the attorney-client and work product privileges and the Fourth Amendment. Over the government's objection, the district court ruled that appellant had standing to challenge the introduction of the attorney notes file. The district court, however, denied the motion to suppress, finding that the government investigators were guilty of no impropriety in discovering the contents of the file. Further, the court concluded that the contents of the file were not protected by either privilege asserted.

After determining that appellant had standing to raise the attorney-client privilege, the district court ruled that the government had made a *prima facie* showing that these notes fell within the crime-fraud exception to the attorney-client and work product privileges. The attorney-client and work product privileges do not apply where legal representation and communications are used

to further intended or continuing illegality, *see In re Grand Jury Proceedings*, 600 F.2d 215, 218 (9th Cir. 1979); *United States v. Hodge*, 548 F.2d 1347, 1353 (9th Cir. 1977), and this exception applies whether or not the attorney is aware that his advice is sought in furtherance of an improper purpose, *see United States v. Friedman*, 445 F.2d 1076, 1085-86 (9th Cir.), *cert.denied*, 404 U.S. 958 (1971). In order to defeat a claim of privilege, illegal activities need not be proven beyond a reasonable doubt; *prima facie* evidence of illegal activities is sufficient. *See Friedman*, 445 F.2d at 1085-86.

In this case, the attorney notes clearly reflected that the attorney was advising appellant to orchestrate his actions in order to permit the filing of false or misleading documents in the rescission offer. It was the government's position as spelled out in the indictment, that appellant and his accomplices had diverted substantial funds from Drywood corporation into Building K as a part of their own real estate venture. Appellant, however, had claimed that the funds were advanced by Drywood for leasehold improvements on the building for Drywood's benefit and that no partnership or joint venture had existed between appellant and his accomplices. The attorney notes, however, reflect a conversation with another attorney which indicates that a partnership or joint venture had in fact existed. The notes further reflect that this relationship was to be kept secret from the government authorities because it was "in conflict with the documents which are being proposed for the rescission offer." Thus, it is clear that appellant and the attorney were attempting to orchestrate their actions in order to effect the filing of a rescission offer containing false and misleading statements.

Finally, appellant contends that the attorney notes file should be suppressed because it was unlawfully seized from the attorney's office. Since the discovery of the attorney notes in question came as a result of a consensual examination of the attorney's files regarding Drywood Corporation, appellant is left with the claim that the examination conducted by the SEC and the Department of Corporations investigators exceeded the scope of the consent that had been given. Appellant claims that the attorney had consented only to an examination of those "non-privileged records of Drywood Corporation."

Appellant's contention is untenable. During the examination of the records, Drywood's attorney directed the investigators to the conference table and, in unambiguous terms, advised them they could examine the documents on the table. It was during the examination of these documents that the Building K attorney's notes were discovered. The clear implication of the consent given was that the investigators could freely examine all documents on the table, without regard to any reservations that the attorneys may have had. *See United States v. Lopez-Diaz*, 630 F.2d 661, 666-67 (9th Cir. 1980).

Appellant argues that the government investigators should have realized that any folder bearing the notation "Attorney Notes" was left on the table inadvertently and was not intended to be disclosed to the investigators. The district court rejected appellant's contention that the investigators were on notice that these materials were privileged. We cannot conclude that this finding is clearly erroneous, because such notice is inconsistent with the language of the subpoena issued by the SEC which called for, *inter alia*, "copies of all documents (except privileged communications or work product) pertainig to litigation

. . . including pleadings, legal instruments, *notes*, memorandums, or correspondence." Further, while appellant contends that the government investigators immediately realized upon reading the label that potential attorney-client privileges were at issue, the investigators testified that the issue of attorney-client privilege was not raised until after the notes had been reviewed. The district court did not commit clear error in crediting this testimony. Therefore, given the scope of the consent given by Drywood's attorneys, the investigators were guilty of no impropriety in opening the file and reading its contents.

III

Appellant's third contention is that Lawrence Kiser, an SEC attorney who participated in the prosecution of appellant appeared before the grand jury without authorization. Appellant contends that Kiser's appearance before the grand jury requires that the indictment be dismissed. Appointments as special assistants to the United States Attorney under 28 U.S.C. §543 were specifically addressed to this circuit in *United States v. Hawthorne*, 626 F.2d 87, 88-90 (9th Cir. 1980). In *Hawthorne*, the United States Attorney requested the appointment of two special assistants. These assistants were appointed in letters which read exactly the same as Kiser's second appointment letter. *Id.* at 89, n.2. Although there was no specific reference to grand jury appearance, this court held that special assistants authorized under §543 were granted powers coextensive with those of other assistant United States Attorneys and therefore appointment letters need not specify all the duties and responsibilities of the special assistants and specifically need not expressly authorize the special assistants to appear before the grand jury.

IV

Appellant's final argument is that Kiser should have been disqualified from assisting in the trial preparation because an attorney who had once been retained by appellant was later an employee of the Los Angeles regional office of the SEC. Appellant relies on *Lasky Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 826 (2nd Cir. 1955), *cert.denied*, 350 U.S. 932 (1956), where the court stated, "all authorities agree that all members of a partnership are barred from participating in a case from which one partner is disqualified."

The imputation of knowledge between partners of a private law firm, however, has never been extended to the context of government attorneys. Indeed, in *United States v. Weiner*, 578 F.2d 757 (9th Cir.)(per curium), *cert.denied*, 439 U.S. 981 (1978), we specifically found that the imputation of knowledge between government attorneys is "tenuous." *Id.* at 767. Moreover, in this case, the SEC specifically used its Seattle branch office to investigate allegations of wrongdoing which centered in Southern California. The Los Angeles office, where Mercer was employed, was bypassed in order to more easily establish a "Chinese wall" between the SEC investigation and appellant's former counsel. In short, appellant's claim that an entire government agency should be disqualified from a particular case solely because one government attorney has been disqualified has no basis in law or logic.

AFFIRMED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KOSTANENOS NICK HRONOPOULOS, Defendant-Appellant.	FILED July 18, 1986 No. 84-5310 **ORDER**

BEFORE: WALLACE, FARRIS, and NORRIS, Circuit Judges

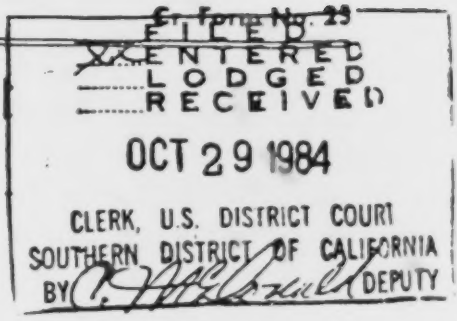
The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX B

JUDGMENT AND COMMITMENT (Rev. 2-68)



United States District Court
for the
SOUTNERN DISTRICT OF CALIFORNIA

United States of America
v.
KOSTANENOS NICK
HRONOPOULOS (1)

No. 82-0159-G-Criminal

On this 26th day of October, 1984, came the attorney for the government and the defendant appeared in person and with counsel, Richard A. Kirschner.

IT IS ADJUDGED that the defendant, upon his plea of guilty, has been convicted of the offenses of conspiracy, to commit mail fraud, to commit securities fraud, and interstate transportation of securities taken by fraud, in violation of Title 18 USC 371, 1341, 2314, and Title 15 USC 77Q(a) and 77x, as charged in count 1 in the indictment, and of income tax evasion in violation of 26 USC 7201 as charged in count twenty-five (25) in the indictment in twenty seven counts, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced,

and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on count 25, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonmnet for a period of two (2) years and pursuant to 18 USC 4205(b)(2), that Court specifies that the defendant shall become eligible for parole at such time as may be determined by the United States parole Commission.

IT IS ADJUDGED tht [sic] on count 1, the imposition of sentence is suspended and the defendant is placed on supervised probation for a period offive [sic] (5) years, on condition that he make his annual financial statements available to his Probation Officer, that he keep his Probation Officer advised of his whereabouts at all times and that he obey all laws.

IT IS ORDERED that the defendant's period of probation shall commence upon his release from the term of incarceration imposed.

IT IS ORDERED that the remaining counts are hereby dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Earl B. Gilliam

EARL B. GILLIAM
United States District Judge,

Filed: October 26, 1984
WILLIAM W. LUDDY,
Clerk

By: C. McDonald
C. McDonald,
Deputy Clerk

I hereby attest and certify on 10-31-84
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my
legal custody.

WILLIAM W. LUDDY
CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

By C. McDonald Deputy

2 of 9

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 8, 1986, I served the within *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
U.S. Department of Justice
Tenth and Constitution
Avenue
Washington, D.C. 20530

William Braniff
Assistant United States Attorney
United States Attorney's Office
United States Courthouse
940 Front Street, Room 5-N-19
San Diego, California 92189

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)